Supreme Court, U.S.
FILED
MAY 15 2000
OFFICE OF THE CLERK

No. 99-1850

In The
Supreme Court of the United States

SANDRA SLAYDON HAWES,
ROBERT A. MUSCARELLA, MANOHAR B. KADAM,
CAROLYN HOLDER,
pro se, on behalf of themselves and class of similarly situated persons,

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I APP. 1-43

Sandra Slaydon Hawes
23 Madeline Court
Helmetta, NJ 08828
(732) 521-0351

Robert A. Muscarella
90 Jamie Court
Monmouth Junction, NJ 08852
(732) 274-2060

Vanita Kadam
Estate of Manohar B. Kadam
14 Stout Court
East Brunswick, NJ 08816
(732) 254-1596

Carolyn Holder
Apt.#952A Village Drive
North Brunswick, NJ 08902
(732) 846-3629

INDEX FOR APPENDIX VOL. I

Opinion and Order of the United States Court of Appeals for the Third Circuit filed on October 20, 1999 ---------- 1-18

Orders denying Petitions for rehearing and rehearing *en banc* dated December 30,1999 ---------- 19-20

Opinion and orders of the District Court of New Jersey - 24-43
Hawes, *et al* ---------- 24-31
Class Certification ---------- 32-38
Holder ---------- 39-43

INDEX FOR APPENDIX VOL. II

Severance Plan and Summary Plan Description of Johnson and Johnson and Affiliated Companies, --------- 44-58
(attached to the Affidavit of Joann Heffernan Heisen, as Exhibit A)

Retirement Plan of Johnson and Johnson and Affiliated Companies, COVER and TABLE OF CONTENTS ----- 59-62

ARTICLE 12, EARLY RETIREMENT INCENTIVES, the Retirement Plan of Johnson and Johnson and Affiliated Companies, pages 73-75. ---------- 63-65

EXHIBIT E, EARLY RETIREMENT INCENTIVE PROGRAMS, of the Retirement Plan of Johnson and Johnson and Affiliated Companies ---------- 66-73

The Order of Magistrate Judge Ronald Hedges of March 20, 1995 ---------- 74-77

Defendants' Response to the Order of Magistrate Judge Ronald Hedges of March 20, 1995 ---------- 78-84

SEVERANCE GUIDELINES PPC ENGINEERING (MILLTOWN PLANT CLOSURE) **(JA171)** ---------- 85

JA189, Memo to Robert Muscarella from R. J. Rapiejko, indicating choice between separation package and VEREP ---------- 86

Second Affidavit of Robert Muscarella---------- 87-91
Exhibit **F**, attached thereto ---------- 92-93
Exhibit **H**, attached thereto ---------- 94
Exhibit **I**, attached thereto---------- 95
(Signature page, CERTIFICATION OF PENSION PLAN AMENDEMENT AND RESTATEMENT)

INDEX FOR APPENDIX VOL. III

Affidavit of Joann Heffernan Heisen---------- 96-99
(Note: Exhibit A, J&J Severance Plan, attached thereto at App.48-58)

Supplemental Affidavit of Joann Heffernan Heisen ------ 100-101
Exhibit A as attached thereto ---------- 102-103
(Denial of severance to Holder)

Denial of severance to; Hawes, Muscarella, Kadam ------ 104-108

Affidavit of Robert Muscarella ---------- 109-112

TRANSCRIP [1] (partial) of audio tape from proceeding (Oral Argument) before the 3rd Circuit Panel on September 22, 1999 ---------- 113-129

Statutes Involved, set out verbatim ---------- 130-142
28USC §1254 (1) ---------- 130
29USC §621 (a) ---------- 130-131
29USC §623 (a) (1), (2), (3) ---------- 131-132
29USC §623 (f) (2) (A) ---------- 132

---

[1] May it please the Court, by information provided by the Clerk of Court, Petitioners are informed, the RULES of the Supreme Court of the United States, adopted January 11, 1999, effective May 3, 1999, do not prohibit inclusion of a TRANSCRIP which has not been certified.

INDEX FOR APPENDIX VOL. III

Statutes Involved, set out verbatim, continued.

29USC §623 (f)(2)(B) (i), (ii) ---------- 132-133
29USC §623 (f) (3) ---------- 133
29USC §623 (i) (8), (9) ---------- 133
29USC §623 (k) ---------- 134
29USC §623 (*l*) (i), (ii), (iii) ---------- 134
29USC §626 (c) (1) (2)---------- 135-136
29USC §630 (a), (b), (f), (*l*) ---------- 135-136
29USC §631 (a) ---------- 136
29USC §1001 ---------- 137
29USC §1002 (1), (3) ---------- 137

Code of Federal Regulations1625.10 (a),(b),(c),(d),(f) --- 138-142

Citations from Defendants' Reply Brief on Appeal
From Page 14 ---------- 143
From Page 18 ---------- 143
From Pages 39-40 ---------- 143-144

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-6408

SANDRA SLAYDON HAWES, Plaintiff on behalf of herself and classes of similarly situated persons

V.

JOHNSON & JOHNSON;
THE SEVERENCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR; PAUL J. RIZZO; JOAN G. COONEY; PHILIP M. HAWLEY; ROGER B. SMITH, in their official capacities;
XYZ COMPANIES, the not yet identified affiliates of the Johnson & Johnson and affiliated Companies Severance Plan; MCNEIL-PPC, INC., also known as Personal Products Company, a New Jersey Corporation;
JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS, MATERIALS & RESEARCH, an unincorporated affiliate of Johnson & Johnson;
THE JOHNSON & JOHNSON PENSION COMMITTEE;
JOHNSON & JOHNSON MEDICAL, INC.;
JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO., a New Jersey Corporation;
JOHNSON & JOHNSON ORTHOPEDICS, INC., a New Jersey Corporation;
JOHNSON & JOHNSON SERVICES, INC., a New Jersey Corporation;
LIFESCAN, INC., a California Corporation;
MCNEIL SPECIALTY PRODUCTS COMPANY;
NORAMCO, INC., a Georgia Corporation;
ORTHO PHARMACEUTICAL CORP., a Delaware Corporation;
ORTHO BIOTECH, INC., a New Jersey Corporation;
SITE MICROSURGICAL SYSTEMS, INC., a Pennsylvania Corporation;

R.W. JOHNSON PHARMACEUTICAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.;
ABSORBENT PRODUCTS & MATERIALS RESEARCH;
ADVANCED CARE PRODUCTS, INC., a New Jersey Corporation;
CELLULOSE PRODUCTS CORP., a New Jersey Corporation;
CODMAN & SHURTLEFF, INC.;

[end of page 1]

CRITIKON, INC., a Florida Corporation;
ETHICON, INC., an Ohio Corporation;
ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio;
IMMUNOBIOLOGY RESEARCH INSTITUTE, INC.;
IOLAB CORPORATION, a California Corporation;
VALENTINA JANSSEN PHARMACEUTIC, INC.;
JANSSEN RESEARCH FOUNDATION;
JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY, a New Jersey Corporation;
JOHNSON & JOHNSON FINANCE CORPORATION, a New Jersey Corporation;
JOHNSON & JOHNSON HEALTH MANAGEMENT, INC., a New Jersey Corporation;
JOHNSON & JOHNSON HOSPITAL SERVICES, INC., a New Jersey Corporation;
JOHNSON & JOHNSON INTERNATIONAL SYSTEMS COMPANY, a New Jersey Corporation

(Newark, New Jersey District Civil 94-5332)

ROBERT A. MUSCARELLA; MANOHAR B. KADAM, Plaintiffs on behalf of themselves and classes of similarly situated persons

V.

JOHNSON & JOHNSON, a New Jersey Corporation;
SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR;

PAUL J. RIZZO; JOAN G. COONEY; PHILIP M. HAWLEY;
ROGER B. SMITH, Committee members, in their official capacities;
XYZ COMPANIES, the not yet identified affiliates of the Johnson & Johnson and Affiliated Companies Severance Plan;
MCNEIL-PPC, INC., a/k/a
PERSONAL PRODUCTS COMPANY, a New Jersey Corporation;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC., a New Jersey Corporation;
JOHNSON& JOHNSON WORLDWIDE ABSORBENT PRODUCTS & MATERIALS &RESEARCH, an unincorporated affiliate of Johnson & Johnson;
JOHNSON & JOHNSON PENSION PLAN COMMITTEE

(Newark, New Jersey District Civil No. 95-4351)

[end of page 2]

CAROLYN HOLDER, on behalf of herself and classes of similarly situated persons

V.

JOHNSON & JOHNSON;
THE SEVERANCE PLAN OF JOHNSON & JOHNSON AND AFFILIATED COMPANIES, ITS PLAN ADMINISTRATOR;
JOHNSON & JOHNSON PENSION COMMITTEE;
MCNEIL-PPC., INC., also known as Personal Products Company;
JOHNSON & JOHNSON WORLDWIDE ABSORBENT PRODUCTS & MATERIALS RESEARCH, an unincorporated division of Johnson & Johnson, and as class actions defendants, the affiliates of the Severance Plan of Johnson & Johnson and Affiliated Companies;
JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.;
JOHNSON & JOHNSON VISION PRODUCTS, INC.;
"A"-COMPANY, a Johnson & Johnson Company;
ADVANCED CARE PRODUCTS, INC.;
CELLULOSE PRODUCTS CORP.;
CODMAN & SHURTLEFF, INC.;
CRITIKON, INC.;
ETHICON, INC.;

ETHICON ENDO-SURGERY, an unincorporated entity doing business in Ohio;
IMMUNOBIOLOGY RESEARCH INSTITUTE, INC.;
IOLAB CORPORATION;
JANSSEN PHARMACEUTICAL, INC.;
JANSSEN RESEARCH FOUNDATION, an unincorporated entity;
JOHNSON & JOHNSON ADVANCED MATERIALS COMPANY;
JOHNSON & JOHNSON DEVELOPMENT CORPORATION;
JOHNSON & JOHNSON FINANCE CORPORATION;
JOHNSON & JOHNSON HEALTH MANAGEMENT,INC.;
JOHNSON & JOHNSON HOSPITAL SERVICES, INC.;
JOHNSON & JOHNSON INTERNATIONAL;
JOHNSON & JOHNSON INTERNATIONAL SYSTEMS COMPANY; JOHNSON & JOHNSON MEDICAL, INC.;
JOHNSON & JOHNSON MERCK CONSUMER PHARMACEUTICALS CO.;
JOHNSON & JOHNSON ORTHOPEDICS, INC.;
JOHNSON & JOHNSON SERVICES, INC.;
LIFESCAN, INC.;
MCNEIL CONSUMER PRODUCTS CO.;
MCNEIL SPECIALTY PRODUCTS COMPANY;
NORAMCO, INC.;
ORTHO BIOTECH, INC.;
ORTHO DIAGNOSTIC SYSTEMS, INC.;
ORTHO PHARMACEUTICAL CORP.;
SITE MICROSURGICAL SYSTEMS, INC.;
R.W. JOHNSON PHARMACEUTICAL RESEARCH INSTITUTE, an unincorporated entity doing business in New Jersey;
THERAKOS, INC.

(Newark, New Jersey District Civil No. 95-4351)

[end of page 3]

(Newark, New Jersey District Civil No. 95-4351)

Sandra Slaydon Hawes, Robert A. Muscarella,
and the Estate of Manohar Kadam,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
District Judge: Honorable Nicholas H. Politan

Argued
Wednesday, September 22, 1999

BEFORE: BECKER, Chief Judge, GARTH, Circuit Judge
and POLLAK,* District Judge

(Opinion Filed: OCT. 20 , 1999)

Carol H. Alling (Argued)
Selikoff & Cohen, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233

Counsel for Appellants, Slaydon Hawes.
Robert A. Muscarella, Estate of Manohar
Kadam and Carolyn Holder

Francis X. Dee (Argued)
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street

---

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[end of page 4]

Newark, New Jersey 07102

Attorneys for Appellees
Johnson & Johnson. et als.

Sally Dunaway
Laurie A. McCann
AARP Foundation Litigation

Melvin Radowitz
American Association of Retired Persons
601 E Street, NW
Washington, D.C. 20049

Attorneys for Amicus Curiae. American
Association of Retired Persons

MEMORANDUM OPINION OF THE COURT

GARTH, Circuit Judge:

Appellants, Sandra Slaydon Hawes, Robert Muscarella, the estate of Manohar B. Kadam, and Carolyn Holder,[1] sought damages and other equitable relief from their former employer, Johnson & Johnson, pursuant to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Age Discrimination in Employment Act ("ADEA"), and the New Jersey Law Against Discrimination ("LAD"). On appeal, the named plaintiffs argue that the District Court erred in dismissing their causes of action that

---

[1]This opinion will refer to appellants collectively as "named plaintiffs."

[end of page 5]

arose from certain Johnson & Johnson decisions concerning the distribution of employee benefits. We will affirm the judgment entered by the District Court.

I

The District Court exercised jurisdiction over the named plaintiffs' federal claims pursuant to 28 U.S.C. § 1332, and over pendent state claims pursuant to 28 U.S.C. § 1367. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291. As all issues raised on appeal concern matters of law, our review is plenary.

II

Each of the named plaintiffs were employed as a part of the engineering department of the McNeil-Personal Products Company ('TPC"), a subsidiary of Johnson & Johnson ("J&J"), in 1993. In August of that year, PPC announced that it was closing its engineering department effective October 30, 1993. At this time, each of the named plaintiffs were covered by both the J&J severance plan and the J&J retirement plan.

The J&J severance plan provides covered employees with benefits, upon the occurrence of a "severance event," in the form of two weeks of base pay for each year of service, capped at a total of 104 weeks of pay. Under section 4.1 of the plan, a "severance event" occurs as the result of "i. position elimination; ii. A Participant's inability to meet the requirements of his or her position; iii. reduction in force; or iv. for such other reasons as the Pension Committee may, in its sole *discretion,* deem appropriate." (emphasis added). Importantly, however, section 4.2 declares that those who retire are not eligible for

[end of page 6]

severance benefits, "except that a Participant whose employment is terminated as a result of an event listed in Article 4. 1 (a) and who elects to retire under a retirement plan of the Company shall be granted severance pay." Finally, section 5. 1 (d) entitles the Pension Committee to "in its sole *discretion,* authorize a reduction in the severance pay to a Participant hereunder by the amount of any discharge, dismissal, or severance allowance or similar payment to which the Participant is or shall be entitled." (emphasis added)

Soon after announcing the closing of the engineering department, J&J offered both the named plaintiffs and any others

who were negatively impacted by the closing an opportunity to receive a different severance package. For many, this alternative package would provide an amount above and beyond that which was available under the general J&J severance plan, but it was only available if the employee signed a waiver releasing all claims against J&J. Both parties concede that none of the named plaintiffs signed such a waiver so as to qualify for this special severance package.[2]

Further, before the PPC engineering department actually closed its doors, J&J announced a new program entitled "Voluntary Early Retirement Enhancement Program" ("VEREP"). Employees were eligible for VEREP if the subsidiary for which they worked agreed to participate in the program, they were already vested in another J&J retirement

[end of page 7]

[2]At oral argument, counsel for the named plaintiffs argued that they failed to sign the appropriate waiver because a member of J&J's management staff had advised them that such a waiver was not necessary. The record before this Court, however, fails to reflect such a assertion.

plan, were over the age of fifty, and had completed seven years of service with the company. VEREP's benefit provisions can be divided into three different categories: (1) pension benefits; (2) medical and life insurance benefits; and (3) service benefits. VEREP added five additional years of credit to an individual's age and added three years credit to the individual's service with the company, actions that greatly increased the amount of pension benefits to which the employee would otherwise have been entitled under the general J&J retirement plan. An employee who elected VEREP also would become immediately eligible for medical benefits at the time of his or her retirement, rather than having to wait to achieve the age of fifty-five. Finally, VEREP provided employees with a "service benefit," a cash payment calculated by multiplying the employee's years of service with the company by two weeks of base pay, capped at fifty-two weeks of compensation.[3]

Each of the named plaintiffs opted to partake in VEREP, and as a result of this participation, they received service benefits in the

following amounts: Hawes: $20,092; Muscarella: $67,800; Kadam: $60,200; Holder: $7,823.16. Despite receiving these payments, each of the named plaintiffs also applied for severance benefits under the J&J general severance plan. J&J denied each request, stating that all J&J employees had been

---

[3]Although the cap under VEREP is lower than that under the general severance plan, J&J asserts that the VEREP cap did not apply to any of the named plaintiffs. Once again, however, the record before this Court, fails to reflect such a claim.

[end of page 8]

informed that they could not participate both in VEREP and also receive severance pay under the J&J plan.[4]

Hawes, Muscarella, and Kadam filed three separate actions against J&J between November 2, 1994, and August 16, 1995, in the United States District Court for the District of New Jersey. The three actions were consolidated through an amended complaint filed on May 26, 1995. Holder filed a separate action on August 16, 1995, which the District Court consolidated with the others on January 31, 1996. Each action alleged violations of ERISA, ADEA, and the LAD.[5]

The District Court granted J&J summary judgment on the named plaintiffs' ERISA, ADEA, and LAD claims insofar as such claims were based on J&J's failure to pay severance benefits. The District Court denied the plaintiffs' petition for class certification after referring the petition to a Magistrate Judge and receiving his report and recommendation. Ultimately, the District Court dismissed the remaining claims brought by

---

[4] The record does not indicate the method by which J&J transmitted this information to its employees generally. At oral argument, however, counsel for J&J asserted that seminars were held to educate employees about VEREP's terms, and at these sessions, J&J staff advised employees that they could not participate in VEREP and also receive general severance benefits. The record does indicate that one of the named plaintiffs, Mr. Muscarella, was provided with this information both verbally and in writing. App. at JA189.

[5] The named plaintiffs' claims of discrimination under the ADEA and the LAD stem from allegations that J&J both forced the named plaintiffs to choose between severance benefits and participation in VEREP and chose the named plaintiffs for

termination rather than transfer on the basis of age and gender. Only the former of these claims has been appealed to this Court.

[end of page 9]

Hawes and Holder, and proceeded to trial on Muscarella and Kadam's remaining claims. After the jury returned a verdict in favor of J&J on September 23, 1998, this timely appeal ensued.

III

We first turn to the named plaintiffs' allegation that J&J violated ERISA in refusing to pay benefits under the J&J severance plan to those employees, including themselves, who chose to participate in VEREP. ERISA provides employees with a vehicle by which they may bring an action against their employer for amounts they allege to be due under an employee benefit plan governed by the statute. See 29 U.S.C. § 1132(a)(1)(B). If an ERISA plan grants the plan administrator (here, the J&J Pension Committee) discretion in interpreting the plan's terms, a court must review the administrator's decision to either grant or deny benefits under the "arbitrary and capricious" standard. See. e.g., Dewitt v. Penn-Del Directory 106 F.3d 514, 520 (3d Cir. 1997). There is little doubt that the J&J severance plan grants the J&J Pension Committee the requisite discretion so as to warrant this deferential standard of review. See J&J Severance Plan § 4.1(a), (b) (stating that the events that trigger the payment of severance benefits, as well as those events that disqualify an employee from severance benefits, can be dictated by the Pension Committee "in its sole discretion"); § 5. 1 (d) (stating that reductions in severance pay as the result of the payment of other benefits are to be authorized by the Pension Committee "in its sole discretion"). As such, we "must uphold [the] plan interpretation even if [we] disagree[] with it, so long

[end of page10]

as the administrator's interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the plan." Dewitt 106 F.3d at 520; see also Gillis v. Hoecht Celanese Corp., 4 F.3d 1137, 1141 (3d Cir. 1993).

J&J's rationale for denying the named plaintiffs' application for severance benefits is that such benefits were already provided as a part of VEREP as the "service benefit"; indeed, J&J argues,

identical formulae were used to calculate both the severance benefit and VEREP's "service benefit." In this respect, J&J invokes section 5.1(d) of the J&J severance plan, which allows the J&J Pension Committee to reduce an employee's severance pay in an amount equal to any other "similar benefit" that the employee receives. The named plaintiffs retort that the "service benefit" is not similar to severance pay because the "service benefit" is paid out of different J&J assets, is paid via an annuity rather than a simple cash payment, and implicates different tax consequences for recipient employees.

The named plaintiffs' arguments elevate, quite literally, form over substance. The fact that a J&J employee's severance benefits are calculated in the exact same fashion as his or her service benefit under VEREP indicates that the employee's "bottom line" for either benefit is identical. This fact alone renders the two different benefits "similar" in nature so as to justify J&J's decision to reduce the named plaintiffs' severance pay by the amount of the "service benefit." Because the two benefits were calculated identically, the named plaintiffs receipt of VEREP's "service benefit" authorized J&J to offset severance benefits completely.

[end of page 11]

We therefore hold that J&J's decision to equate the VEREP "service benefit" with benefits offered under the J&J severance plan so as to cause an offset in the named plaintiffs' severance benefits was rational and therefore not arbitrary and capricious.[5]

IV

The named plaintiffs also appeal the District Court's dismissal of their claims under the ADEA and the LAD, insofar as such claims allege that J&J unlawfully discriminated against older workers by requiring them to choose between severance benefits and VEREP participation.[7]

The ADEA prohibits discrimination "with respect to ... compensation, terms, conditions, or privileges of employment, because of [an] individual's age." 29 U.S.C. § 623(a) (l). Before 1990, however, an employer could only be held liable for unlawful age discrimination with regard to employee benefits if the employee could prove that the benefit system at issue was meant to be a

"subterfuge" with respect to the prescriptions on age discrimination. See Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 165-66 (1989). As the result of the Supreme Court's holding in Betts, however, Congress passed

[6]The named plaintiffs also appeal the District Court's denial of ERISA class certification. Such an appeal, however, is rendered moot by our holding that the named plaintiffs themselves do not possess a viable ERISA cause of action.

[7] For purposes of this appeal, the analysis under both the ADEA and the LAD is the same. See Turner v. Schering-Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990) (stating that the LAD "utilizes the same analytical framework as is applicable under the ADEA" (citing Shaner v. Horizon Bancorp, 561 A.2d 1130 (N.J. 1989); Goodman v. London Metals Exchange, Inc., 429 A.2d 341 (N.J. 1981))).

[end of page 12]

the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990), which enacted wholesale changes to ADEA's liability scheme. Although OWBPA removed language mandating that plaintiffs prove that an employer was attempting to "subterfuge" ADEA provisions through a particular employee benefit scheme, it did not change the fundamental tenet of any discrimination claim - that an employer treat members of a protected class (here, those over the age of forty) adversely. See 29 U.S.C. § 623(a)(1).

The named plaintiffs argue that J&J treated older workers adversely by forcing them to choose between normal severance and retirement benefits and the enhanced retirement package known as VEREP, a choice not given to younger J&J workers. However, it appears that the named plaintiffs, and other workers over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options, one that provided benefits identical to those available to younger employees and another that provided *greater* benefits than were given to younger employees. Viewed from this perspective, the named plaintiffs cannot meet their burden to prove that J&J treated older workers less favorably than younger counterparts. Indeed, the District Court, after a rather cursory analysis, found that "plaintiffs were treated better than the younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits."

[end of page 13]

The named plaintiffs' argument runs deeper, however. The named plaintiffs argue that they had vested in *both* the severance plan and VEREP, and therefore they were entitled to *both* severance pay as a part of the J&J general severance plan and VEREP's service benefit. Because participation in VEREP was premised on achieving the age of fifty, forcing such workers to choose between severance and VEREP benefits when they had vested in both programs, according to the named plaintiffs, constitutes unlawful age discrimination.

As support for this proposition, the named plaintiffs cite this Court's opinion in EEOC v. Westinghouse Elec. Co., 869 F.2d 696 (3d Cir. 1989) (generally known as Westinghouse II - We held in Westinghouse II that once an employee had vested in both a *severance* and a *pension* plan, an employer may not condition early retirement on a limitation of severance pay by the amount of pension benefits to which an employee was entitled. See id. at 705. In other words, once vested in both plans, an employer may not lawfully force older workers to choose between the two types of benefits as a condition of early retirement, especially when younger workers who were not eligible for early retirement were not obligated to make such a choice. See id.

The Supreme Court vacated our holding in Westinghouse II and remanded the matter back to this Court for reconsideration in light of its decision in Betts. In enacting OWBPA, Congress explicitly referenced the Westinghouse line of cases with approval. See. e.g. S. Rep. No. 101-263, at 22, reprinted in. 1990 U.S.C.C.A.N. 1509, 1527. The

[end of page 14]

named plaintiffs claim that Congress's rejection of Betts and its endorsement of the Westinghouse line of cases reaffirms our decision in Westinghouse II.[8] We ultimately need not reach this issue, however, because even assuming that Westinghouse II serves as binding precedent, its holding does not assist the plaintiffs in proving that J&J engaged in adverse treatment towards older workers.

In Westinghouse II we held that an employer could not condition early retirement upon a deduction of vested *severance benefits* by the amount of vested *pension benefits* to which the employees were already entitled when younger employees could choose to take their vested severance benefits without affecting their pension benefits, which would vest in the future. In this respect, the named plaintiffs' ADEA claim becomes intertwined with their EPJSA claim. As stated earlier, section 5.1(d) of the J&J general severance plan authorized J&J, in its sole discretion, to offset severance benefits by similar payments such as the VEREP service benefit. This provision serves to defeat the named plaintiffs' ERISA claim, and it is equally harmful to their ADEA claim. Even if the named plaintiffs were vested in both *plans*, they were never entitled to, or, in other words, never vested in both types of *benefits*. As a result, J&J did not deduct *vested* severance benefits from *vested* pension benefits.

---

[5]This Court has yet to render an opinion on this issue since Congress enacted OWBPA, although one panel has suggested that the OWBPA *might* have resurrected Westinghouse II.

[end of page 15]

Nor did J&J give younger employees any type of advantage over their older cohorts; in fact, they did quite the opposite. Older employees, such as the named plaintiffs, could choose between either their normal pension rights, which they would be entitled to in the near future, and severance pay (as younger employees were forced to do), or they could take under VEREP's more attractive package, which included immediately available enhanced early pension benefits, enhanced retiree insurance benefits, and service benefits that were in many respects the functional equivalent of severance benefits. In this case, older employees were indeed the favored class. Cf., May v. Shuttle, Inc., 129 F.3d 165, 174-75 (D.C. [APP] Cir. 1997) (per curiam) (holding that plaintiffs failed to establish a prima facie case of age discrimination when plaintiffs' only evidence of age discrimination was that older, retirement eligible employees were given the choice of taking a lesser option or a

---

better option, and younger employees could only receive the lesser option). Westinghouse II therefore is inapposite. We therefore hold that J&J did not treat its older employees adversely in forcing them to choose between participation in VEREP (and receipt of its "service benefit") and general severance pay.

Both parties, as well as amicus curiae American Association of Retired Persons, spend a considerable amount of space in their briefs discussing the "safe harbors" from ADEA liability that Congress promulgated as a part of OWBPA. See. e.g. 29 U.S.C. § 623(f)(2)(B)(i) (articulating the "equal benefit, equal cost" defense). In essence, these provisions of the ADEA are affirmative defenses - they allow an employer to escape

[end of page 16]

liability even if it a challenged benefit scheme treats older workers adversely to younger counterparts. As we hold that the named plaintiffs have not met their initial burden to prove adverse treatment we need not address "safe harbor" arguments.

V

For the foregoing reasons, the District Court orders granting summary judgment to J&J on the named plaintiffs' claims under ERISA, the ADEA, and the LAD, dated December 22, 1995, and May 9, 1996, are affirmed. Consequently, the named plaintiffs' petition for class certification under ERISA is moot, and therefore the District Court's order denying such petition, dated February 28, 1996, is also affirmed.

TO THE CLERK:

Please file the foregoing opinion.

s/s Garth

Circuit Judge

[end of page 17, end of opinion]

(Newark, New Jersey Civil No. 95-4351)

Sandra Slaydon Hawes, Robert A. Muscarella,
and the estate of Manohar Kadam,

Appellants

On Appeal from the United District Court
for the District of New Jersey
District Judge: Honorable Nicholas H. Politan

Argued
Wednesday, September 22, 1999.

BEFORE. BECKER, Chief Judge, GARTH, Circuit Judge and POLLAK, District Judge*

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on Wednesday, September 22, 1999.

On consideration whereof, it is now here ADJUDGED AND ORDERED by the court that the orders of the District Court filed December 22, 1995, and May 9, 1996, granting Johnson & Johnson summary judgement, and February 28, 1996 denying the

---

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[end of page]

petition of Sandra Slaydon Hawes, Robert A. Muscarella, The estate of Manohar B. Kadam, and Carolyn Holder for class certification, be the same are hereby affirmed.

ATTEST:

s/s P. Douglas Sisk

Clerk

DATED: OCT 20 1999

Certified as a true copy and issued in lieu of formal mandate on January 10, 2000.

Teste: s/s P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit.

[end of page, end of Judgement]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United States Courthouse
601 Market Street
Philadelphia PA 19106-1790

P. Douglas Sisk
Clerk

Telephone
215-597-5017

January 10, 2000

Mr. William T. Walsh, Clerk
United States District Court for the District of New Jersey
50Walnut Street
Martin Luther King Jr., Federal Building & Courthouse
Newark, NJ 07101

Re: Docket No. 98-6408
Hawes vs. Johnson & Johnson
D. C. Civil Nos. 94-cv-05332, 94-cv-06203 95-cv--04351

Dear Mr. Walsh:

Enclosed is a certified copy of the judgement in the above-entitled case(s), together with copy of the opinion. The certified judgement is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

( ) We return herewith the certified record in the case(s).

(X) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the attached copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgement is also enclosed showing costs taxed, if any.

Enclosure
cc:
Carol H. Alling, Esq.
Francis X. Dee, Esq.
Sally P. Dunaway, Esq.

P. DOUGLAS SISK, Clerk
s/s Laura L. Davis
By: Laura L. Davis
Case Manager

BEFORE: BECKER, Chief Judge, SLOVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO,
McKEE, RENDELL, BARRY and GARTH* Circuit Judges
and POLLAK,* District Judge.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

BY THE COURT:

s/s Becker

Chief Judge

DATED: DEC. 30 1999

LD/cc: CHA RAM
SPD SSH
FXD

*As to panel rehearing only.

*As to panel rehearing only.

[end of page, end of order]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 8, 1999

No. 98-6408

Re: Hawes vs. Johnson & Johnson

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, MCKEE, RENDELL, BARRY, AND GARTH, Circuit Judges, AND POLLAK, District Judge.

1. Motion filed by Appellants Pro se for leave to file Amended Petition for Rehearing En Banc.

2. Motion filed by Appellants Pro se for leave to supplement the Amended Petition for Rehearing En Banc.

3. The Memorandum Opinion was filed and Judgment entered on 10/20/99

s/s

Laura L. Davis, Case Manager
Direct Dial 597-5017

ORDER

The foregoing motion is granted, nunc pro tunc*

* This order was signed prior to the entry of the order denying rehearing but was inadvertently not filed. The order denying rehearing took into consideration and was intended to speak on all Petitions for rehearing (including amended petitions)

Dated: JAN 13 2000

By the Court,
s/s Rendell
Circuit Judge

LD/cc: CHA, RAM,
SPD, SSH, FXD [end of page, end of Order]

APP.21-23 PAGES PURPOSELY ABSENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM,

Plaintiffs,

v.

JOHNSON & JOHNSON, et al,

Defendants.

CIVIL ACTION NO. 94-5332 (NHP)

HON. NICHOLAS H. POLITAN

ORDER

ORIGINAL FILED
DEC. 22,1995
WILLIAM T. WALSH, CLERK

This matter having come before the Court on the crossmotions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and the Court having heard oral argument on December 5, 1995, and considered the matter and the submissions of the parties, and good cause having been shown,

IT IS on this 18th day of December, 1995 hereby

ORDERED that defendants' motion is GRANTED, and it is further

ORDERED that plaintiffs' motion is DENIED.

s/s
NICHOLAS H. POLITAN
U.S.D.J.

ENTERED
On
THE DOCKET
on 12-26-1995
WILLIAM T. WALSH, CLERK
By s/s
(Deputy Clerk)

PB 1-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

MARTIN LUTHER KING, JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N. J. 07101-0999

NOT FOR PUBLICATION

December 18, 1995

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Carol H. Sapakie, Esq.
Selikoff & Cohen
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
Attorneys for Plaintiffs
Muscarella, Kadam and Slaydon

Stephen F. Payerle, Esq.
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:

This matter comes before the Court on the cross-motions the parties for partial summary judgement pursuant to Fed.R. Civ.P. 56. Oral argument was heard on December 5, 1995, and I reserved decision. For the reasons stated herein, plaintiffs' motion is DENIED and defendants' motion is GRANTED.

[end of page] **PB 1-2**

STATEMENT OF FACTS

Plaintiffs' were employees of Personal Products Company ("PPC"), a wholly owned subsidiary of defendant Johnson &: Johnson. On August 20, 1993, plaintiffs were informed that their positions at PPC were being eliminated at the end of October of the same year. Plaintiffs were told that they were eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants, Voluntary Early Retirement Enhancement Program ("VEREP"). Because VEREP provided them with additional benefits and immediate retirement monies, plaintiffs chose to accept VEREP rather than the standard severance.

Plaintiffs filed this action on November 2, 1994, challenging the policy of defendant which required them to chose between VEREP and the standard severance plan. In Counts one through five of their Second Amended Complaint, plaintiffs allege that defendants deprived them of their severance benefits in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), and discriminated against them on the basis of ace in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD") The present motions followed.

---

[1]The plaintiffs are Robert Muscarella, Manohar Kadam, and Sandra Slaydon Hawes. They have moved to have themselves certified as a class action. The motion is presently under review.

[end of page 2]

DISCUSSION

Standard of Review

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3rd Cir. 1987), cert. dismissed, 483 U.S. 1052 (1987). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, for which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986), cert. dismissed, 484 U.S. 1066 (1988). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Id. Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), cert. denied, 481 U.S. 1029 (1987). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Speculation, conclusory allegations, and mere denials are not enough to raise genuine issues of material facts.

[end of page 3] **PB 1-4**

II ERISA

Plaintiffs argue that they are entitled to benefits from both the severance plan and VEREP. Defendants, on the other hand, assert that plaintiffs voluntarily chose to participate in VEREP rather than the severance plan. Plaintiffs argue that forcing them to make such a choice violates ERISA. The Court does not agree.

An employee does not have a right to severance in the absence of the employer's contractual agreement to provide it upon termination. See Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991) (citing Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 279 (3d Cir. 1984) and Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3d Cir. 1988)), cert. denied, 503 U.S. 938 (1992). In the instant matter, defendant Johnson & Johnson adopted a severance plan. See Severance Plan & Summary Plan Description. Article 4 of the plan described the eligibility requirements for severance. Id. at 4. Under the plan, one whose employment is terminated through retirement is not entitled to severance except where the termination is a result of certain enumerated reasons, including position elimination. Id. at § 4.1(b)(ii). Defendants assert that plaintiffs were not terminated, but were given the option to retire by taking VEREP; therefore, § 4.1(b)(ii) is not applicable to plaintiffs.

Assuming arguendo that plaintiffs were involuntarily terminated, defendants argue that other provisions in the plan

[end of page 4] **PB 1-5**

give defendants discretion not to pay the benefits listed in § 4.1(b)(ii). Section 4.3 of the plan provides:

> The Pension Committee shall, in its sole discretion, determine whether or not a Severance Event has occurred with respect to a Participant and may impose such other eligibility conditions on payment of benefits hereunder as it may deem advisable. The Pension Committee shall have absolute discretion in interpreting or applying the terms of this Plan.

Id. at § 4.3 (emphasis added).

Defendants urge that this provision allows them to provide plaintiffs with a choice between participating in the severance plan or VEREP. The Third Circuit, in Hamilton, held that a reservation of authority in a severance plan does not violate ERISA, "as long as that limitation is explicitly stated as part of the plan."

Hamilton, 945 F.2d at 77-78. Plaintiffs, at oral argument, admitted that there is nothing in ERISA which prohibits case-by-case interpretations of a severance plan when such discretion in clearly set forth in the plan. The Court finds that the language of 9 4.3 of defendants' severance plan clearly reserves to defendants the right to deny severance in certain circumstances. Discretionary decisions of an employer to deny severance benefits are reviewed under the arbitrary and capricious standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Under this standard, "the decision maker's determination to deny benefits must be upheld unless it was 'clear error' or not 'rational'." Gillis v. Hoechst Celanese

[end of page 5] **PB 1-6**

Corp., 4 F.3d 1137, 1141 (3d Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994).

In the case sub judice, there is nothing irrational about defendants' decision to deny plaintiffs severance after they chose to participate in VEREP. If plaintiffs had not elected VEREP, then under the severance plan they would be entitled to severance, health benefits, and vested pension rights. Upon election of VEREP, however, plaintiffs received more benefits --they were awarded immediate receipt of their retirement benefits and additional medical benefits. Accordingly, the Court holds that defendants, decision to deny severance to employees who participated in VEREP was not arbitrary and capricious.

III. **ADEA**

Plaintiffs argue that by forcing plaintiffs, who were over age fifty, to choose between the severance plan and VEREP constitutes age discrimination because the younger employees were not required to make the same election. Plaintiffs assert that if they chose to take-VEREP, they were forced to give up severance which the younger employees received. Defendants illustrate, however, that if plaintiffs had chosen to accent severance, like the younger employees, they would have received the same amount and would not have jeopardized their vested pension rights. Instead, plaintiffs

were allowed to chose an early retirement plan which provided them with more financial reward than the severance plan.

[end of page 6] **PB 1-7**

ADEA prevents an employer from "discriminat [ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The order and allocation of proof in an age discrimination case is governed by the three-part test set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), for Title VII cases, and accepted by the Third Circuit for use under ADEA. See, e.g., Chipollini, 814 F.2d at 897-898. First, plaintiff must make out a prima facie case. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the employer carry the burden, the plaintiff must show by a preponderance of the evidence that the proffered reason is actually a pretext for discrimination. Turner v. Schering-Plough Corp., 901 F.2d 335, 341-42 (3d Cir. 1990) (citing Burdine v. Texas Dept. of Community Affairs, 450 U.S. 248, 252-53 (1981).

To establish a prima facie case, plaintiff is required to prove that he or she was treated adversely based an age. DiBiase v. SmithKline Beecham Co., 48 F.3d 719, 725-27 (3d Cir.), cert. denied, 116 S. Ct. 306 (1995). In the context of discretionary denial of benefits, the court should compare the benefits received by younger and older employees. See McCambridge v. Bethlehem Steel Corp., 873 F. Supp. 919, 926 (E.D. Pa. 1994).

[end of page 7] **PB 1-8**

In the present case, plaintiffs were treated better than the younger employees because VEREP entitled them to immediate receipt of their pension benefits and additional medical benefits. Neither older nor younger employees were allowed toparticipate in both VEREP and the severance plan. Hence, plaintiffs have failed to state a valid claim of age discrimination.[2]

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is **GRANTED** and plaintiffs' cross-motion for summary judgment is **DISMISSED.**

An appropriate order accompanies this Opinion.

s/s

NICHOLAS H. POLITAN

U.S.D.J.

---

[2]Plaintiffs claim of age discrimination based on New Jersey Law Against Discrimination ("LAD") is premised on the same facts as their claim under ADEA. Hence, for the reasons stated above, plaintiffs' LAD claim also fails.

The Court notes that defendants also move to dismiss the LAD claim on the theory of ERISA preemption. While the Court does not find it necessary to address that issue, the Court recognizes that plaintiffs have not contested that point of defendants' motion.

[end of page 8] **PB 1-9**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA and MANOHAR B. KADAM,
Plaintiffs,

v.

JOHNSON & JOHNSON, et al,
Defendants.

CIVIL ACTION NO. 94-5332 (NHP)

HON. NICHOLAS H. POLITAN

ORDER

FILED
Feb 28,1996
AT 8:30 11:30 aM
WILLIAM T. WALSH
CLERK

This matter having come before the Court on the Report and Recommendation of Magistrate Judge Ronald J. Hedges recommending the denial of plaintiffs' motion for class certification, and the Court having considered the matter as well as the objections of plaintiffs submitted thereto, and for the reasons appearing more particularly in the Letter Opinion of this Court and good cause having been shown,

IT IS on this 28th day of February, 1996 hereby

ORDERED that that the Report and Recommendation of Magistrate Judge Ronald J. Hedges is hereby ADOPTED, and it is further

ORDERED that plaintiffs' motion for certification is DENIED.

s/s

NICHOLAS H. POLITAN
U.S.D.J.

PB 2-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

MARTIN LUTHER KING, JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N. J. 07101-0999

NOT FOR PUBLICATION

FILED
Feb 28,1996
At 8:30 11:30 aM
WILLIAM T. WALSH
CLERK

February 28, 1996
LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Carol H. Sapakie, Esq.
SELIKOFF & COHEN
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
Attorneys for Plaintiffs
Muscarella, Kadam and Slaydon

Stephen F. Payerle, Esq.
CARPENTER, BENNETT & MORRISEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:
This matter is presently before the Court on the Report and

Recommendation of Magistrate Judge Ronald J. Hedges, filed January 30, 1996, recommending that plaintiffs'[1] motion for class certification pursuant to Fed.R.Civ.P. 23 be denied. Plaintiffs have submitted objections to the Report and Recommendation, which are discussed herein. For the reasons stated below, the findings and recommendations of the Magistrate

---

[1]The named plaintiffs are Robert Muscarella, Manohar Kadam and Sandra Slaydon Hawes.

[end of page] **PB 2-2**

Judge are adopted by this Court, and the motion is **DENIED.**

The complaint arises out of plaintiffs' participation in an early retirement program offered by defendants. Plaintiffs were employees of Personal Products Company ("PPC"), a wholly owned subsidiary of defendant Johnson & Johnson. On August 20, 1993, plaintiffs were informed that their positions at PPC were being eliminated at the end of October of the same year. Plaintiffs were told that they were eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants' Voluntary Early Retirement Enhancement Program ("PPC")). Because VEREP provided them with additional benefits and immediate retirement monies, plaintiffs chose to accept VEREP rather than the standard severance.

Plaintiffs filed this action on November 2, 1994, challenging the policy of defendant which required them to chose between VEREP and the standard severance plan. In Counts one through five of their Second Amended Complaint, plaintiffs allege that defendants derived them of their severance benefits in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), and discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD").

On December 5, 1995, the Court heard oral argument on the cross-motions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and reserved decision. On December

[end of page 2] **PB2-3**

[22], 1995, the Court denied plaintiffs' motion and granted defendants, motion. Plaintiffs also made a motion for class certification pursuant to Fed.R.Civ.P. 23. On January 30, 1996, Magistrate Judge Hedges recommended that plaintiffs, motion be denied.[2]

In his report, the Magistrate Judge analyzed the standard for class certification set forth in Rule 23(a). See Fed.R.Civ.P. 23(a). The Court agrees with Magistrate Judge Hedges, determination that the numerosity requirement is satisfied because over eighty persons may fall within the class, some of which are non-residents of New Jersey. Furthermore, the Magistrate Judge concluded that the commonality requirement was met. The Court acknowledges that plaintiffs' common claim is simply whether they are entitled to severance in addition to the benefits received under the early retirement program.

The Magistrate Judge, however, concluded that plaintiffs were unable to satisfy the requirements of typicality and adequacy of representation. Plaintiffs, admit that not all potential class members requested severance and were thereafter denied. The potential plaintiffs who did not request severance would have to prove that such an effort would have been futile. Requiring the present plaintiffs to prove an element of a claim

---

[2]In their objections, plaintiffs make reference to a number of facts which they argue were incorrectly reported by the Magistrate Judge. See Plaintiff's objections I.A, I.B, I.C, I.D, I.E. The Court, in its recitation of the facts above, has corrected any discrepancy in the facts reported by the Magistrate Judge.

which is not necessary to their claim defeats typicality. See General Tele. Co. of the Southwest v. Falcon,-457 U.S. 147, 158 (1982). For the same reason, named plaintiffs may place insufficient emphasis on the defenses asserted by defendants against these potential plaintiffs. See Zinberg v. Washington Bankcorp, Inc., 138 F.R.D. 397, 408 (D.N.J. 1990). Likewise, the named plaintiffs cannot provide adequate representation if their interest may be antagonistic to those of the class. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), cert. denied , 421 U.S. 1011 (1975). Therefore, the Court

finds, as did the Magistrate Judge, that the requirements of typicality and adequacy of representation cannot be satisfied.

Furthermore, Magistrate Judge Hedges acknowledged that class certification under the Age Discrimination in Employment Act ("ADEA") merely requires a showing that the named plaintiffs are "similarly situated" to class members. 29 U.S.C. § 626(b). The Court concurs with the finding of the Magistrate Judge that plaintiffs are not similarly situated because the facts surrounding their choice of the early retirement program and, therefore defenses which may be asserted by defendants are different.

Plaintiffs object to the Magistrate Judge's finding that the class members' failure to exhaust administrative remedy defeats the typicality requirement. Plaintiffs urge the Court to employ a "creative procedural solution" to the exhaustion requirement by administratively terminating the case while the class members

[end of page 4] **PB 2-5**

pursue administrative remedies. Plaintiffs cite two cases for this unique proposition. The Court, however, does not find these cases persuasive. In Communications Workers of America v. American Telephone and Telegraph Co., the court was not dealing with a motion for class certification. See 40 F.3d 426 (D.C. Cir. 1994). Rather, the court reversed the district court's excuse of exhaustion to the plaintiffs, and dismissed the plaintiffs claim without prejudice. Id. at 433-34. Furthermore, the court emphasized that waiver of the exhaustion requirement was appropriate only in exceptional circumstances. Id. at 432.

Likewise, plaintiffs, reliance on Tomczscyn v. Teamsters, Local 115 Health & Welfare Fund is misplaced. See 590 F. Supp. 211 (E.D. Pa. 1984). In Tomczscyn, the district court was not analyzing the viability of a class action. Rather, the court was presented with the defendant's motion for summary judgment based on the plaintiffs' failure to exhaust administrative remedies. Id. at 212-13. The court granted defendant's motion, but in light of the defendant's failure to properly notify the plaintiffs of their right to an appeal the administrative decision, the court provided the plaintiffs sixty days to complete their appeals. Id. at 217. No such unique circumstances are present in the case sub judice.

Furthermore, the Court is unpersuaded by the case cited by plaintiffs, Weiss v. York Hospital, 745 F.2d 78G (3d Cir. 1984), cert. denied, 470 U.S. 10GO (1985). In Weiss, the proposed class of plaintiffs consisted of physicians who were discriminated by

[end of page 5] **PB 2-6**

the defendant's discriminatory hospital admissions policy. Id. at 810-11. Unlike the case at hand, the defendant did not argue that the class of plaintiffs would be subject to different defenses than the named plaintiff. Subsequently, the Third Circuit has clarified that just because the plaintiffs are asserting a common claim does not mean that their interest are satisfactorily aligned for class action purposes. In Re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 800 (3d Cir. 1995).

The Court is also unpersuaded by plaintiffs' argument that they will be required to present evidence of futility to prove their own claims for punitive damages. The fact that similar evidence can be used to prove two different claims does not mean that the class plaintiffs, interests will be vigorously represented. As such, the typicality and adequacy of representation requirements cannot be satisfied.

Finally, the Court is satisfied that the requirements for class certification under ADEA and LAD are not met. While the Third Circuit acknowledged that the existence of different defenses does not Automatically vitiate joinder, the court did not require joinder either. Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 52 (3d Cir. 1989). Rather, the Third Circuit merely reiterate that the decision is one for the court after careful deliberation. Id. After such analysis in the instant case, the Court concludes that the "similarly situated" standard

[end of page 6] **PB 2-7**

for class certification under ADEA or LAD are not met.[3]

I have fully reviewed the Magistrate Judge's Report and Recommendation and have conducted a de novo review of the record. Based upon my review, I accept and adopt the findings and recommendations of the Magistrate Judge. Accordingly, I hereby direct that plaintiffs' motion is **DENIED.**

An appropriate Order accompanies this opinion.

s/s

NICHOLAS H. POLITIAN
U. S. D. J.

---

[3]In their final objection, plaintiffs object to the Magistrate Judge's recommendation that, even if plaintiffs were similarly situated, class certification should be denied because of failure to provide adequate notice to defendants. The Court finds that this was an alternative grounds for denying class certification, and not necessary to the initial finding that the "similarly situated" standard has not been satisfied. Therefore the Court need not address this argument.

[end of page 7] _ **PB 2-8**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDRA SLAYDON HAWES, et al, Plaintiffs, v JOHNSON & JOHNSON, et al, Defendants.	CIVIL ACTION NO. 94-5332 HON. NICHOLAS H. POLITAN ORDER
CAROLYN HOLDER Plaintiff, v. JOHNSON & JOHNSON, et al, Defendants.	CIVIL ACTION NO. 95-4351 **FILED** MAY 09,1996 AT 8:30 ...11.....M WILLIAM T. WALSH CLERK

This matter having come before the Court on the crossmotions of the parties for partial summary judgment pursuant to Fed.R.Civ.P. 56, and the Court having considered the matter and the submissions of the parties, and good cause having been shown,

IT IS on this 9th day of May, 1996 hereby

ORDERED that defendants' motion is GRANTED, and it is further

ORDERED that plaintiff Counts one through five of plaintiff's Complaint are DISMISSED.

s/s
NICHOLAS H. POLITAN
U.S.D.J

ENTERED
on
THE DOCKET
on 5-13-1996
WILLIAM T. WALSH, CLERK
By s/s
(Deputy Clerk)

PB 3-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHLOS H. POLITAN
JUDGE

MARTIN LUTHER KING, JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N. J. 07101-0999

NOT FOR PUBLICATION

FILED
MAY 09, 1996
AT 8:30 ...11.....M
WILLIAM T. WALSH
CLERK

May 9, 1996

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Carol H. Sapakie, Esq.
SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
Attorneys for Plaintiffs
Muscarella, Kadam and Slaydon

Francis X. Dee, Esq.
CARPENTER BENNETT & MORRISSEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attorneys for Defendants

Re: Hawes v. Johnson & Johnson
Civil Action No. 94-5332 (NHP)

Dear Counsel:

This matter is presently before the Court on defendants' motion for partial summary judgement of plaintiff Carolyn Holder's Complaint, pursuant to Fed.R. Civ.P. 56. No oral argument

was heard in accordance with Fed.R.Civ.P. 78, For the reasons stated herein, defendants' motion is GRANTED.

This Complaint arises out of the same facts which are the

[end of page] **PB 3-2**

subject of the litigation before this Court in Hawes v. Johnson & Johnson, No 94-5332 (D.N.J.). [1] In sum, plaintiff was an employee of Personal Products Company ("PPC"), a wholly owned subsidiary of Johnson & Johnson. On August 20, 1993, plaintiff was informed that her position was being eliminated at the end of October of the same year. Plaintiff was told that she was eligible for severance. Subsequently, PPC announced that its salaried employees who were over the age of fifty and had at least seven years of service were qualified to participate in defendants' Voluntary Early Retirement Enhancement Program ("VEREP"). Because VEREP provide her with additional benefits and immediate retirement monies, plaintiff chose to accept VEREP rather the standard severance.

Plaintiff filed this action on August 16, 1995, challenging the policy of defendants which required her to chose between VEREP and the standard severance plan. In Counts one through five of her Complaint, plaintiff alleges that defendants deprived her severance benefits in violation of the Employee Retirement Income Employment Act of 1974 ("ERISA"), and discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") and the New Jersey Law Against Discrimination ("LAD").

On December 12, 1995, in the Hawes case, the Court granted defendants' motion to dismiss Counts one through five of the

---

[1]This action was consolidated with the Hawes action-on January 26, 1996, pursuant to an order of Magistrate Judge Ronald J. Hedges.

[end of page2] **PB 3-3**

plaintiffs' Complaint.[2] Defendants now move for partial summary judgment to dismiss Counts one through five of the Holder Complaint for the same reasons previously enumerated by the Court in Hawes. See Hawes v. Johnson & Johnson. et al, No. 94-5332 (D.N.J. Dec. 18, 1995).

The causes of action asserted by plaintiff in Counts one through five of her Complaint are identical to those asserted by the same Counts in the Hawes Complaint. Therefore, unless the Court is persuaded that the facts surrounding plaintiff Holder's Complaint are relevantly different, there is no basis upon which the Court could hold differently. See Carteret Sav. Bank, F.A. v. Shushan, 721 F. Supp. 705, 706 (D.N.J. 1989), modified on other grounds, 919 F-2d 225 (3d Cir. 1990).

The only factual distinction asserted. by plaintiff is that she was fifty-five years of age and had nine years of service with the company; therefore, plaintiff f contends that she was already entitled to any normal early retirement benefit plan offered by defendants.[3] Plaintiff, however, fails to illustrate

---

[2]Defendants did not simultaneously move for partial summary judgment in this case because the motion papers in Hawes were filed before the Holder Complaint was served on November 17, 1995.

[3]Plaintiff asserts an additional argument for denying defendants' motion for partial summary judgment. Plaintiff asserts that the Court's previous decision of December 18, 1995, did not completely dismiss Counts one through five of the Hawes Complaint. Rather, plaintiff contends that there still remains a viable claim for separation pay.

Plaintiff misinterprets the Court's opinion. The Court construed those Counts in the Hawes' Complaint, and likewise the Holder Complaint, to assert a cause of action for severance benefits and age discrimination based on the failure to pay those

[end of page 3] **PB 3-4**

the significance, if any, of this factual distinction. The Court's previous decision to grant summary judgment was based on the fact that the persons who chose VEREP rather than severance were economically advantaged. Furthermore, the Court held that there was no evidence of age discrimination because the older employees, plaintiffs, were treated better than the younger employees, i.e. received more money.

Accordingly, for the same reasons annunciated by the Court in Hawes v. Johns & Johnson, No. 94-5332 (D.N.J. Dec. 18, 1995), defendants' motion for partial summary judgment is GRANTED, and Counts one through five of plaintiff Holder's Complaint are DISMISSED.

An appropriate order accompanies this Opinion.

s/s

NICHOLAS H. POLITAN

U.S.D.J.

benefits. The Court does not find a colorable claim for separation pay any where in Counts one through five of the Complaints. Therefore, the Court's previous decision dismissed Counts one through five in their entirety.

[end of page 4] **PB 3-5**